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Sabrina Sobri v Perkanas Sdn Bhd

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HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22–204 OF 2008
SEE MEE CHUN JC
20 APRIL 2011

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Tort — Trespass to land — Encroachment — Defendant housing developer in adjoining plot built drains onto plaintiff's land — Whether evidence of encroachment rebutted — Whether drains cause of water and waste flowing onto plaintiff's land — Whether plaintiff had discharged burden of proof

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The defendant was the developer of a housing project on land adjoining Lot 651 which was owned by the plaintiff. The plaintiff alleged the defendant had built, without her permission, drains on Lot 651 which caused water and waste ('the discharge') to be discharged onto her land. She sued the defendant for an injunction and damages for trespass and to make good Lot 651 as a result of the

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discharge. The defendant denied committing trespass and attributed the discharge to the low-lying nature of Lot 651 as well as to the existence of two other housing development projects in the vicinity and a nearby village and school. During the trial, the only quantity surveyor who testified, and whose testimony was not rebutted, was the one appointed by the plaintiff. He

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tendered his report, plan and photographs to show that drains built by the defendant had encroached into Lot 651.

Held, allowing the plaintiff's claim for damages for trespass with costs:

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(1) The drains were built on Lot 651 without the plaintiff's permission and this amounted to trespass (see para 10).

(2) Taking into account the low-lying nature of Lot 651 and the quantity surveyor (PW2) agreeing that heavy rain would result in water flowing from a higher to a lower area, the fact a part of Lot 651 was *kawasan berpaya* and Lot 651 being surrounded by two other housing projects, a village and a school, the plaintiff had not proved on a balance of probability that the discharge into Lot 651 was caused by the defendant's act of building the drains (see para 22).

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[Bahasa Malaysia summary

Defendan adalah pemaju projek perumahan di atas tanah bersebelahan Lot 651 yang mana dimiliki oleh plaintif. Plaintif mendakwa defendan telah membina, tanpa keizinannya, parit atas Lot 651 yang menyebabkan air dan buangan ('pembuangan') disalirkan ke atas tanah plaintif. Plaintif menyaman

defendan untuk injunksi dan ganti rugi untuk pencerobohan dan membaikpulih semula Lot 651 akibat pembuangan tersebut. Defendan menafikan melakukan pencerobohan dan menyebabkan pembuangan tersebut ke bahagian rendah Lot 651 dan juga kepada dua projek pembangunan perumahan yang lain di dalam kawasan tersebut dan kampong dan sekolah yang berdekatan. Pada masa perbicaraan, satu-satunya juruukur bahan yang memberi keterangan, dan keterangan yang tidak dipatahkan, adalah seorang yang dilantik oleh plaintif. Beliau menyerahkan laporannya, pelan dan fotograf-fotograf untuk menunjukkan bahawa parit yang dibina oleh defendan telah menceroboh ke dalam Lot 651.

Diputuskan, membenarkan tuntutan plaintif untuk ganti rugi untuk pencerobohan dengan kos:

(1) Parit tersebut dibina atas Lot 651 tanpa keizinan plaintif dan ini menyebabkan pencerobohan (lihat perenggan 10).

(2) Dalam mengambilkira bahagian kawasan rendah Lot 651 dan juruukur bahan tersebut bersetuju bahawa hujan lebat akan mengakibatkan air mengalir daripada kawasan tinggi ke kawasn rendah, fakta sebahagian Lot 651 adalah kawasan berpaya dan Lot 651 dikelilingi oleh dua projek perumahan yang lain, sebuah kampong dan sekolah, plaintif tidak membuktikan atas imbangan kebarangkalian bahawa pembuangan ke dalam Lot 651 adalah disebabkan oleh tindakan defendan membina parit tersebut (lihat perenggan 22).]

Notes

For cases on encroachment, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1721–1722.

Cases referred to

Cheah Kim Tong & Anor v Taro Kaur [1989] 3 MLJ 252, HC (refd)

Karuppannan v Balakrishnan (Chong Lee Chin & Ors, third parties) [1994] 3 MLJ 584, FC (folld)

Patel and others v WH Smith (Eziot) Ltd and another [1987] 2 All ER 569, CA (refd)

Ong See Teong & Anor v Tengana Nasional Bhd [2008] 5 MLJ 717, HC (refd)

Legislation referred to

Electricity Supply Act 1990 s 13
Town and Country Planning Act 1976 s 21(2)

Frick Kong Yat Sen (SP Ng & Associates) for the plaintiff.
CC Chang (Syarikat Ng & Anuar) for the defendant.

See Mee Chun JC:

[1] The plaintiff is the registered owner of Lot 651 Mukim Bukit Pinang Daerah Kota Setar Kedah (Lot 651). The defendant is the developer of a housing project known as Taman Pinang Merah on land adjoining Lot 651. The plaintiff says the defendant had built drains on her land which caused water and waste to be discharged onto it. The plaintiff seeks an injunction, damages for trespass and to make good Lot 651 as a result of the water and waste discharged. The defendant denies the trespass and says the discharge arose because of the low lying nature of Lot 651 and that the damage was also due to the fact of two other housing development projects in the vicinity and a nearby village and school.

[2] There were two witnesses for the plaintiff — the first plaintiff witness (PW1, the plaintiff herself) and the second plaintiff witness (PW2 — Azman bin Mohamad, quantity surveyor). The defendant had three witnesses — the defendant witness (DW1 — Zir Omar Khan bin Mohamad), Site Supervisor of Taman Pinang Merah), the second defendant witness (DW2 — Teh Sui Teik, engineer) and the third defendant witness (DW3 — Dato Choo Beng Kai, director defendant company).

TRESPASS

[3] PW2 was appointed by PW1 to survey Lot 651 and and he prepared a letter dated 26 June 2006 (P6) that drains measuring 1200mm x 1200mm built by the developer of Taman Pinang Merah had encroached into Lot 651. Attached to the letter was a plan P8 drawn by him showing the various spots such as Lot 651, Taman Pinang Merah and the drains. He had taken photographs (P5). In Q&A 7 of his witness statement (P7) as to what the plan and photographs show, he says:

> Secara kolektif mereka menunjukkan bahawa parit air buangan yang dibina oleh Defendan sebagai pemaju Taman Pinang Merah telah mencerobohi kedalam tanah lot Plaintif menyebabkan air serta sisa-sisa buangan melimpah memasuki lot Plaintif. Tanah lot Plaintif sekarang dah jadi macam kolam air.

[4] DW1 was unsure whether the drains were inside or outside Lot 651 and said a quantity surveyor would be able to determine that.

[5] DW2 the engineer responsible for the building and infrastructure of Taman Pinang Merah in Q&A 3 of his witness statement (D13) said the drains 'terletak di sepanjang Tanah Plaintif'. In cross-examination DW2 initially said the drains were in Lot 651. He later said the drains were outside the boundary

of Lot 651 and then said the drains were in Lot 651. In re-examination he clarified 'sepanjang' meant 'di boundary' and this was outside the plaintiff's land.

[6] In so far as the location of the drains are concerned the evidence of DW1 and DW2 in particular that of DW2 do not help the defendant at all. In fact DW1 says a quantity surveyor can determine the location and as the only quantity surveyor who gave evidence was PW2 his evidence that the drains were on Lot 651 ought to be accepted. That aside, his evidence on location was clear and not challenged or rebutted either in cross-examination or by the defendant's own witnesses or by the defendant calling a quantity surveyor.

[7] In addition in the decision of YA Datuk Ho Mooi Ching dated 10 November 2009 on the plaintiff's inter parte application for interim injunction it is stated that the the defendant's counsel 'admitted that the drains were indeed built on the plaintiff's land'.

[8] PW1 had given evidence that the defendant had not sought her permission to build the drains on Lot 651.

[9] The Federal Court in *Karuppannan v Balakrishnan (Chong Lee Chin & Ors, third parties)* [1994] 3 MLJ 584 stated at p 580 that:

> In clear terms, the law has spelt the right of an individual over his land. He is given the 'exclusive use and enjoyment' of the airspace above the surface of his land … The owner of Lot 26 has no legal right to encroach into the airspace of Lot 25 unless of course the owner of Lot 25 allows it'.

and at p 591:

> With or without knowledge of the existence of the protrusions he is answerable in law in regard to the trespass … he is duty bound to remove them.

[10] The principles enunciated in the above case apply here to the rights of the plaintiff over Lot 651. Accordingly I find the drains were built on Lot 651 without the plaintiff's permission and this amounts to trespass.

[11] The defendant contended the building of the drains on Lot 651 (if proved) was in the public interest as the drains had alleviated the flood situation in the area and public interest outweighed the private interest of the plaintiff. The case of *Ong See Teong & Anor v Tenaga Nasional Bhd* [2008] 5 MLJ 717 was cited and a passage at p 737 referred to:

> In assessing whether public interest outweigh the applicant's private rights, this court is mindful of the main objective of the CAR project, which is to prevent the disruption of electricity supply, which happened nationwide on 13 January 2005 … I perceive that the public interest in the prevention of a disruption of electricity supply would outweigh the private interest of the applicants.

[12] That case does not apply to the factual matrix of our case. That case dealt with a judicial review application whereby the respondent had issued a notice under the relevant Act to enter into applicants' lands to, inter alia, carry out works to upgrade distribution supply lines. the respondent was empowered under s 13 of the Electricity Supply Act 1990 (Act 447) to enter into land on which there are supply lines to maintain, repair or upgrade any licensed installation and pay compensation for damage caused. Our present case involves trespass where public interest does not excuse trespass.

[13] The fact that the relevant authority had approved the building of the drains is a non-issue. Section 21(2) of the Town and Country Planning Act 1976 (Act 172) provides that if the applicant for planning permission is not the owner of the land on which the development is to be carried out the written consent of the owner to the proposed development shall be obtained and endorsed on the application.

WHETHER THE DRAINS CAUSED THE WATER AND WASTE DISCHARGE

[14] It is PW2 evidence that the drains led to water and waste discharge into Lot 651. In cross-examination PW2 agreed:

(a) in the vicinity of Lot 651 were other villages and houses;

(b) Lot 651 was lower than the surrounding land and heavy rain would result in water flowing from a higher to lower area;

(c) the *kawasan berpaya* in Lot 651 was already there since 2004

(d) excess water was discharged at Sungar Alor Mati;

(e) water not only came from Taman Pinang Merah but also from Lot 1385 and 1386; and

(f) the water was not just due to the defendant but to other factors.

[15] In re-examination PW2 said the drains ended at Lot 651, any overflow would go into it and water from Lots 1385 and 1386 would enter through the drains ending up at Lot 651.

[16] DW1 in his witness statement said there were housing estates and

villages near Lot 651, part of Lot 651 was *kawasan berpaya* and Lot 651 was near Alor Sungai Mati. He also said there were at least two housing projects nearby being undertaken by Wira Synergy Sdn Bhd (Wira) and Percaya Jaya Sdn Bhd (Percaya). According to him as Lot 651 was a low lying area there would be flash floods after it rained. Referring to P8 he marked various spots showing the relevant places, 'A' for Taman Pinang Merah, 'B' for housing project of Wira, 'C' for housing project of Percaya, 'D' for Alor Sungai Mati and 'E' for the flash flood area.

[17] DW1 also referred to two letters dated 12 June 2004 (D11) and 14 April 2006 (D12) written by the defendant to Majlis Bandaraya Alor Setar referring to a decision of a meeting on 10 May 2004 attended by various agencies and representatives from the defendant, Wira and Percaya whereby it was determined the source of the flooding was Wira and the final discharge would be upgraded and the cost to be borne by the three developers. The discharge would be to Sungai Alor Mati. In cross-examination he disagreed that the discharge point was Lot 651 as the approval from Majlis Bandaraya was for the discharge point at the river.

[18] As for DW2, in cross-examination he said the drains ended at Sungai Alor Mati but was not able to say where that river was. When asked whether the drains ended at Lot 651 he said he was unable to answer and a quantity surveyor would be able to. When pressed on the issue he said he couldn't answer based on the plans in P8 as they were not clear. Finally he said the spot marked as 'X' which in P8 refers to the drains did not end at Lot 651 but at Sungai Alor Mati. As to whether that river was in Lot 651 he said 'Tidak, sebahagian ada'. In re-examination he said the drains ended at Sungai Alor Mati and not the plaintiff's land.

[19] The topography of Lot 651 is that of being in a lower area when compared to the surrounding land. A part of it is *kawasan berpaya*. Nearby are three housing projects including that of defendant, there is also Lot 1385 which are villages and Lot 1386 in which is situated a school. Flash floods have occurred at the spot marked 'E' where is nearer the three housing projects. These were not challenged by the plaintiff.

[20] As to the discharge point PW2 said it was Lot 651 and DW1 and DW2 said it was at the river. The approval referred to by DW1 dated 9 February 2006 (D16) has para 1.9 which requires 'Pemaju hendaklah megemukakan akujanji melalui peguam bahawa pihak pemaju bersetuju untuk menanggung kos untuk meningkatkan Sungai Mati'. This makes it probable that the discharge point was Sungai Mati.

[21] Although D11 and D12 were written by the defendant it can be used to

A support its contention there were other possibilities as to what caused the water and waste discharge into Lot 651. In fact PW2 agreed there could be other factors.

B **[22]** Taking into account the lower lying nature of Lot 651 and PW2 agreeing heavy rain would result in water flowing from a higher to lower area, the fact of a part of Lot 651 being *kawasan berpaya* and Lot 651 being surrounded by two other housing projects, a village and a school, the plaintiff has not proved on a balance of probability the water and waste discharge into Lot 651 was caused by the defendant's act of building the drains.

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REMEDIES

D **[23]** On the remedies sought *Karuppannan* is good authority that once a legal right and violation has been established there can be a perpetual injunction. At p 593 it is stated:

> … once a party … has established his legal right and of the fact of its violation, he is entitled to the perpetual injunction ….

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[24] The English Court of Appeal in *Patel and others v WH Smith (Eziot) Ltd and another* [1987] 2 All ER 569 has held that 'the principle that a landowner whose title was not an issue was prima facie entitled to an injunction to restrain a trespass whether or not the trespass harmed him …'.

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[25] In *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252 it was stated at p 254 that 'any trespass … was even actionable per se, ie without any necessity to prove an actual damage'.

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[26] The defendant sought to limit the claim to damages for trespass to RM10,450 on the basis that the State had agreed to acquire the land over which the drains were built as right of way. This was the evidence of DW3 through paras 5 and 6 of his witness statement (D15). The relevant documents were contained in *ikatan dokumen tambahan defendan* which the defendant sought to introduce on the day of trial. This was objected to by the plaintiff as they were never aware of the documents and that the matter related to disputed facts. All the relevant bundles had been filed in 2010 and there had been previous exchange of documents. The court allowed the objection. Damages

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will not be limited to the amount asserted by the defendant.

CONCLUSION

[27] The plaintiff's claim in (b) and (d) allowed, (a), (c) and (e) dismissed. Costs to the plaintiff.

Plaintiff's claim for damages for trespass allowed with costs.

Reported by Ashok Kumar